

Legal Status of The Third Gender In Our Society

Ms. Sunita Bachhav

Ph.D. scholar at Savitribai Phule Pune University.

Address - C- 19 Vardhman Society

Kondhwa Pune 411048

Mo No. 9766162492

1.1 Introduction

Transgender people have always existed in the Indian society. They are part of our rich history and culture. It's commonplace to find transgender history being made in various mythological texts and religions if we go back in history, transgender was never a problem to the society. They were rather a blessing. The transgender community in India always faces the lawful and social trouble in all spheres of life. Sexual movement between individuals of similar sex is illicit, and same-sex couples legitimately can't wed or get a common association. Since 2017, be that as it may, the Supreme Court is thinking about whether to authorize same-sex sexual activity and a draft Uniform Civil Code, if affirmed in its present form, would sanction same-sex marriage in India.

The real change in perspective where people viewed the transgender people otherwise is when the British came to India and enacted the Criminal Tribes Act, 1871. Institutionalizing of the criminality of transgender played a major role in the long-term deterioration of the living standard of the transgender. The situation never went back to normalcy even after the British left, and that is what we see today.

1.2 The Constitution of India 1950

Article 14 states that; “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”¹

The Transgender persons fall within the expression ‘person’ even though they do not fit squarely into the brood boxes of male and female, hence, entitled to legal protection of laws in all spheres of State activity, as relished by any other citizen of this country. Equal before the law and equal protection by the law is one major thing that unites a nation under the Constitution as it is one of the fundamental rights. Regardless of this, the transgender community in India is seen to suffer under the watchful eyes of the law enforcers. The very custody that is meant to protect has turned into a torture chamber for transgender suspects.

Article 15 (1) “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”²

Article 15 ensures that the state does not discriminate any citizen on the basis of aspects such as religion, race, caste, sex, place of birth among others. With respect to Article 15, sex is mentioned, but not defined. It is assumed in Article 15 that all people fall into the main categories of male and female. It is vital to comprehend the concept and nature of gender identity and sexual orientation before agreeing to the definitions of ‘sex’ as per the Court.

Article 16 says that (1) “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”³

1 Art. 14 of the Constitution of India

2 Art.15 (1) of the Constitution of India

Regardless, it is clearly shown that transgender is a socially and educationally backward class. Who still live under the same pressure they used to in the colonial era? Asking the government to extend reservation to them is definitely not overarching keeping in mind that there has been very little of the implementation of the Article with regards to the third gender. The transgender has long been neglected. Subsequent governments that have come after maintained the status quo and nothing was done to better the lives of the transgender community, despite being proven that transgender is a socially and educationally backward class.

Article 21 says that “No person shall be deprived of his life or personal liberty except according to the procedure established by law.”⁴Everybody has the fundamental right to life, freedom and the security of the individual. The right to life is without a doubt the most important key of all rights. Every single other right adds quality to the life being referred to and relies upon the pre-presence of life itself for their operation.

According to Article 23 “Human being trafficking, begging and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offense punishable in accordance with the law.”⁵

Contrary to **Article 14** and **15** of the Indian Constitution, the transgender person in India does not enjoy equal rights and protection respectively, before the law. These have resulted in them facing extreme discrimination in all spheres of life. This is also portrayed in **Article 16, 19,** and **21** above, as they are not given equal opportunity and freedom of speech and expression and right to life and liberty

3 Art. 16 (1) of the Constitution of India

4 Art.21 of the Constitution of India

5 Art.23 of the Constitution of India

respectively, unlike their counterparts in the UK, USA, and Canada. The same thing applies to **Article23** which entails human trafficking, begging and other forced labor.

1.3 Indian Penal Code, 1860

Lawful discrimination against sexual minorities takes numerous structures, the most important one being Section 377 of the Indian Penal Code (IPC), a British Colonial Legislation criminalizes gay conduct that keeps on being in the Indian statute book in spite of the fact that it has for a long time ago been expelled from the British statute book. Section 377 of the Indian Penal Code, has been extensively used by the law enforcers to harass and exploit transgender persons. This has led to many peaceful demonstrations and pleas from the said groups.

Section 377 says that“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to 10 years and also be liable to fine.”⁶

When we read Section 377 following things are become evident:

1. Although the word carnal intercourse against the order of nature is in the section no description is available about what is the order of nature. What is natural and what is unnatural?
2. When we criminalized somebody there is some reason for the same. This particular section of the community who is not harming anybody they are having sex privately. Criminalizing homosexuals on this basis is sound arbitrary.

⁶ S. 377 of the Indian Penal Code

3. It is immoral to question an individual choice of sexuality because every individual has a right to decide his own sexuality.
4. The classification between heterosexuals and homosexuals is unreasonable. Homosexuals also have the same rights as heterosexuals.
5. There are no scientific bases to recognize sexual acts only which results in the procreation.
6. Section 377 of IPC violates fundamental human rights.

1.4 Immoral Traffic Prevention Act of 1956

Immoral Traffic Prevention Act of 1956 is the main instrument of the Indian state's control of prostitution, which commands to keep the movement of the ladies and youngsters into prostitution.

Again, this Act has been used against the transgender people, especially those who are in the red-light area or have a same-sex relationship. It is obviously depicted that the transgender community is socially and instructively a retrogressive class. Having no education and a means of livelihood, they have turned to prostitution.

1.5 The Protection of Human Rights Act, 1993

The Human Rights discourse that maintains every individual right to live freely provides an outline for individuals to choose and live a lifestyle that is centered on same-sex relationships. Thus, decriminalization of homosexuality, the right to protection from human rights abuses or hate crimes and nondiscrimination on the basis of sexual orientation should be on the agenda of any human rights organization.

1.6 Matrimonial Laws

In India, until today, marriage is not possible between transgenders. This institution is exclusively reserved for heterosexuals. Different enactments like the

Hindu Marriage Act 1955, The Dissolution of Muslim Marriages Act, 1939 and The Indian Christian Marriage Act 1872 doesn't allow the same-sex marriages in India. The same thing with adoption laws which does not allow homosexuals to adopt a child. The Hindu Adoption and Maintenance Act, 1956 also not giving the chance to transgender people to adopt the child.

1.7 Transgender Rights Bills

In India, the transgender rights movement is growing very fast in recent time the general public has also joined hands to fight for the rights of the transgender community.

1.7.1 Rights of Transgender Persons Bill, 2014

Tiruchi Siva Member of Parliament introduced The Rights of Transgender Persons Bill, 2014 which was discussed in the Upper House of the Parliament on December 10, 2014. The present Bill was debated by all the members, and the Bill was sanctioned. The Bill suggested various remedies against discrimination faced by the transgender community. It also provides educational, employment chances, rehabilitation.

The proposed Bill the Rights of Transgender Persons Bill, 2014, seeks to end the alienation of the transgender people in India. This comes after a chain of other related cases in the sphere of the transgender community in India.

1.7.2 Transgender Persons (Protection) Rights Bill 2016

On December 26, 2015, Shri Thaawarchand Gehlot, Minister of Social Justice and Empowerment Presented revised Bill, called "The Transgender Persons (Protection of Rights) Bill, 2016."

Tiruchi Siva DMK Rajya Sabha Member's the Rights of Transgender Persons Bill, 2014 is a competitor to the Transgender Persons (Protection of Rights) Bill,

2016. Tiruchi Siva's Bill was passed in the upper house, but not debated in the Lok Sabha. The Cabinet approved the Transgender Persons (Protection of Rights) Bill, 2016 in August 2018 and it passed in December 2018. Meanwhile, the Supreme Court of India decriminalized homosexuality in September 2018 in Navtej Johar's case

1.7.3 Transgender Persons (Protection) Rights Bill 2018

The Lok Sabha of the parliament passed the Transgender Persons (Protection of Rights) Bill, 2018 on Dec. 17, 2018. This Bill passed with 27 amendments, includes a change in the definition of Transgender Person. The previous definition describes of "transgender persons as neither wholly female or nor wholly male" which was criticized by the transgender community.

1.8 Conclusion

Indian Penal Code 1860 has three Sections affecting the transgender community. **Section 377**, Indian Penal Code was enacted by the British Colonial regime in the year 1860. Not having a specific definition, Section 377 became subject to varied judicial interpretation over the years. Initially covering only anal sex, it later included oral sex and still later includes different forms of unnatural sexual acts. Most of the times Section 377 is used as a tool by the police to annoy, extort, harassment and blackmail the transgender community and prevent them from seeking legal protection from violence, for fear that they themselves would be penalized for sodomy. In 2009, the Delhi High Court in Naz Foundation case had held that Section 377 of the IPC, which criminalizes sex between the adult of these community members as unconstitutional. All the cases regarding transgender rights issues are discussed in detail in the following chapter. Section 294 which speaks about "*Obscene acts and songs*" has been used greatly against the transgender community.

Immoral Traffic Prevention Act of 1956, has provided the legal basis for the arrest and intimidation of the transgender sex workers. As per this Act, any involvement with trafficking or brothel is punishable under this law.

The Protection of Human Rights Act, 1993 speaks clearly against discrimination on the basis of sex. Even though it was only in 1994 that an international human right organization Amnesty International recognized that violence and abuse of the LGBT community based on sexual orientation constituted an infringement of their human rights.

As a duty of the state to protect its citizens, the **Constitution of India** has used Article 14 and Article 15, 16, 19, 21 and 23. **Article 14**, requires the State not deny to any person equality before the law or the equal protection of the laws within the territory of India. **Article 15**, forbids the State from discriminating any citizen based on many aspects such as religion, race, caste, sex, place of birth and others. **Article 16** reinforces the idea of Article 15 by prohibiting discrimination and also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State. **Article 19 (1) (a)** of Indian Constitution ensures that residents have the privilege to the right to speech and expression, but this is yet to be realized especially in issues relating to sexual preference and the transgender community. The same can be said with regard to Article 21 which ensures that everybody has the privilege of life, freedom and the security of the individual. **Article 23** in conjunction with the Immoral Traffic Prevention Act of 1956.